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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 188

HOMAN MFG. CO., INC., AN ILLINOIS CORPORATION, PETITIONER

v.

HAROLD R. ALL, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported in 264 F. 2d 158. The District Court wrote no opinion, and its findings of fact and conclusions of law (R. 104–113)[1] are not officially reported.

[1] Record references are to the separate "Appendix B to Appellant's Brief" filed with the Court of Appeals on the second appeal of this case. References to the supplemental record are to the separate "Appendix to Appellant's Brief" filed with the Court of Appeals on the first appeal of this case.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1959, and the court denied a petition for rehearing on April 10, 1959. The petition for a writ of certiorari was filed on July 7, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly held that Section 7421 of the Internal Revenue Code of 1954 prohibits the maintenance of a suit brought by a corporate taxpayer to restrain the collection of income and excess profits taxes under a jeopardy assessment, where the taxpayer is subject to such taxes, has ceased doing business, has liquidated its assets, and will eventually be able to litigate the amount of its tax liability in the Tax Court.

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 273. JEOPARDY ASSESSMENTS.
>
> (a) *Authority for Making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.
>
> (b) *Deficiency Letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a).

then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

* * * * *

(26 U.S.C. 1952 ed., Sec. 273.)

Internal Revenue Code of 1954:

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7421.)

STATEMENT

This is a suit brought by a corporate taxpayer to enjoin the District Director from collecting income and excess profits taxes under a jeopardy assessment.

In 1952, the taxpayer ceased doing business and liquidated almost all of its assets. Since January 1953, its only place of business has been a small office in Chicago maintained for the settlement of its affairs. (Supp. R. 21.) In 1952, criminal proceedings for tax evasion were instituted against it and three of its principal officers. These proceedings are still pending. (See Pet. App. D.) On September 15, 1955, a jeopardy assessment totalling approximately $3,172,000 was made against the taxpayer for the taxable years 1944–1946. A deficiency notice was mailed on November 14, 1955, and on February 10, 1956, the taxpayer petitioned the Tax Court for a

redetermination of the deficiency. (See Pet. App. C, pp. 21–23.) No further action has been taken in the Tax Court proceedings which are still pending.

Shortly before petitioning the Tax Court, taxpayer commenced the present suit by filing a complaint in the District Court (Supp. R. 13–35) seeking to enjoin collection of the tax under the jeopardy assessment. The District Court granted the taxpayer's motion for summary judgment and entered a permanent injunction. (Supp. R. 416–420.) In vacating this decree, the Court of Appeals considered at length the jurisdictional barriers to the taxpayer's suit, but postponed a decision on that issue by deciding that, in any event, summary judgment had been improvidently granted. (Pet. App. C.)

Following a remand to the District Court, taxpayer moved under Rule 34 of the Federal Rules of Civil Procedure for the production of all documents, reports, and memoranda in the Government's possession having anything to do with the assessment against it. Included in the taxpayer's motion was a request for copies of everything written by the special agent who investigated the criminal case, and a request for the transcript of certain conferences referred to by the Solicitor General in his petition for certiorari in the criminal case. (R. 28–32.) The District Court granted the motion for production (R. 59–64), and when the District Director declined to produce the material on the ground that it was privileged (R. 82), the District Court found, as a fact, that no tax was due for the years 1944–1946 and that the taxpayer's returns for those years were

not fraudulent (R. 104, 112; Supp. R. 24; Pet. App. A., pp. 2–3). The court thereupon entered an order permanently enjoining the District Director and all other revenue officers from taking any steps to collect the assessed taxes, penalties, and interest, or from using any of the material covered by the production order in any court proceeding involving a determination of the taxpayer's tax liability for the years 1944–1946. (R. 114–118.)

In reversing the District Court's order, the Court of Appeals squarely held that Section 7421 of the 1954 Code is a jurisdictional bar to the maintenance of the taxpayer's suit. (Pet. App. A.)

ARGUMENT

The decision below is correct, not only for the reasons given by the Court of Appeals, but also on alternative grounds which that court found unnecessary to consider. There is no conflict of decisions or other reason warranting review by this Court.

1. By virtue of the statutory provisions now appearing in Section 7421 of the Internal Revenue Code of 1954, *supra*, p. 3, no court may enjoin the assessment or collection of federal taxes absent a showing of (1) the illegality of the tax involved, and (2) the presence of special and extraordinary circumstances sufficient to bring the case within an acknowledged head of equity jurisdiction. *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 509; *State Railroad Tax Cases*, 92 U.S. 575, 613–614; *Mensik* v. *Long*, 261 F. 2d 45, 47 (C.A. 7); *Monge* v. *Smyth*, 229 F. 2d 361, 366 (C.A. 9); *Milliken* v. *Gill*, 211 F. 2d 869 (C.A. 4);

Dyer v. *Gallagher*, 203 F. 2d 477 (C.A. 6); *Brasier* v. *United States*, 229 F. 2d 176, 177 (C.A. 10), certiorari denied, 351 U.S. 925.

In the light of these established conditions precedent to injunctive relief, the decision below is clearly correct. As the Court of Appeals noted (Pet. App. A, pp. 3–5), the first prerequisite is lacking because the taxes in question are not "illegal". The taxpayer has never claimed, nor could it demonstrate, that it is not subject to income and excess profits tax. It challenges only the *amount* of the actual assessment. However, it is clear that the statutory bar to injunction suits cannot be lifted simply because there is a dispute about the amount of tax owed by a taxpayer admittedly subject to tax. *Jewel Shop of Abbeville, S.C.* v. *Pitts*, 218 F. 2d 692, 694 (C.A. 4th); *Holdeen* v. *Ratterree*, 253 F. 2d 428 (C.A. 2), affirming 155 F. Supp. 509, 510 (N.D.N.Y.); *Darnell* v. *Tomlinson*, 220 F. 2d 894, 896, fn. 6 (C.A. 5); *Reams* v. *Vrooman-Fehn Printing Co.*, 140 F. 2d 237, 240 (C.A. 6); *Publishers New Press* v. *Moysey*, 141 F. Supp. 340, 343 (S.D.N.Y.). The illegality required for injunctive relief arises where a tax is levied against a taxpayer who is not subject to the tax; it is not present simply because the amount of an assessment may exceed the amount of the taxpayer's actual liability when it is ultimately determined. Cf. *Miller* v. *Standard Nut Margarine Co., supra;* with *Burke* v. *Mingori*, 128 F. 2d 996, 997 (C.A. 10), certiorari denied, *sub nom. Mingori* v. *Broderick*, 317 U.S. 662.

Accordingly, the taxpayer's contention (Pet. 8, 14-16, 25–26) that the amount of the assessment here in-

volved was deliberately set at an excessive figure in order to create the appearance of jeopardy—even if assumed, *arguendo*, to be true[2]—does not afford a basis for injunctive relief. Whether the taxpayer's assertions be viewed as an attack on the District Director's belief regarding the existence of jeopardy (Pet. 8, 29), or as an attack on the amount of the assessment (Pet. 8, 15, 26), it is well settled that neither question can be litigated in a suit to enjoin collection of the tax. The taxpayer does not dispute the fact that the Director made the assessment after consultation with his assistants in the normal course of his duties; and in such a situation the courts have uniformly held that the Director's belief as to the existence of the jeopardy is not subject to judicial review. *Lloyd* v. *Patterson*, 242 F. 2d 742, 743–744 (C.A. 5); *Foundation Co.* v. *United States*, 15 F. Supp. 229, 246–247 (C. Cls.); *Brown-Wheeler Co.* v. *Commissioner*, 21 B.T.A. 755, 756–757; *Communist Party, U.S.A.* v. *Moysey*, 141 F. Supp. 332, 336 (S.D.N.Y.). See Section 273(a) of the Internal Revenue Code of 1939, *supra*, p. 2, and S. Rep.

[2] Contrary to taxpayer's suggestion (Pet. 26, fn. 6), we have never conceded that the assessment in question was capriciously and irrationally set at an excessive figure, and we deny the accusation (Pet. 27, fn. 6) that documents in the Government's possession were not produced because they would have shown that the assessment was "illegal". We have refrained from introducing facts to show the amount of the taxpayer's liability because it is our position that a dispute about the amount of liability does not and cannot confer jurisdiction on the District Court to enjoin collection of the assessed tax. *Burke* v. *Mignori*, *supra*; *Jewel Shop of Abbeville, S.C.* v. *Pitts*, *supra*; *Darnell* v. *Tomlinson*, *supra*; *Holdeen* v. *Ratterree*, *supra*; *Publishers New Press* v. *Moysey*, *supra*.

No. 52, 69th Cong., 1st Sess., pp. 26–27 (1939–1 Cum. Bull. (Part 2) 332, 352). And, as noted above, it is equally well established that the amount of a taxpayer's liability may not be litigated in a suit for injunctive relief. *Publishers New Press* v. *Moysey, supra; Jewel Shop of Abbeville, S.C.* v. *Pitts, supra; Holdeen* v. *Ratterree, supra; Darnell* v. *Tomlinson, supra; Burke* v. *Mignori, supra.* That question can properly be resolved in the pending Tax Court case, but not in proceedings arising out of a suit to enjoin collection.[3]

2. Even if the tax here involved were illegal, which we deny, the result reached by the Court of Appeals would be correct. As previously indicated, jurisdiction to enjoin the collection of a tax exists only if two factors are present. Proof that the tax is illegal is not enough. It must also be shown that special and extraordinary circumstances exist which bring the case within a recognized head of equity jurisdiction. *Miller* v. *Standard Nut Margarine Co., supra; United States* v. *Curd*, 257 F. 2d 347, 350–351 (C.A. 5), certiorari denied, 358 U.S. 920; *Mensik* v. *Long, supra; Milliken* v. *Gill, supra; Brasier* v. *United States, supra.* No such circumstances are present here. It was not until after the taxpayer had ceased doing business and liquidated its assets that

[3] Nor is it appropriate in such proceedings to consider taxpayer's charges with respect to the pending criminal proceedings. While we disagree with the taxpayer's analysis of the latest criminal hearing (Pet. 2–3), and deny the taxpayer's resulting accusations (Pet. 3–5, fn. 2), these are clearly matters to be raised only in appellate proceedings for review of Judge Nordbye's decision in the criminal case. For present purposes, a mere reading of Judge Nordbye's opinion (Pet. App.

the jeopardy assessment was made. (Supp. R. 21.) Consequently, there is not now and never has been any threat that collection of the jeopardy assessment would destroy or harm a going business concern. Furthermore, the assertion (Pet. 29; Supp. R. 25–26) that collection of the jeopardy assessment would render the taxpayer unable to pay for the preparation and defense of related civil and criminal proceedings is irrelevant. It is well established that the theoretical possibility of such a contingency affords no basis for enjoining the enforcement of a jeopardy assessment. *Lloyd* v. *Patterson,* 242 F. 2d 742, 744 (C.A. 5); *O'Connor* v. *United States,* 203 F. 2d 301, 303 (C.A. 4). See also *United States* v. *Brodson,* 241 F. 2d 107, 109 (C.A. 7). Moreover, petitioner's chief officers, Byron H. Cain and Harold E. Sullivan, are co-defendants in the criminal case, and petitioner's defense is necessarily bound up with theirs. Patently, therefore, the allegations in the taxpaper's complaint relating to alleged special circumstances (Supp. R. 24–26) are insufficient to confer jurisdiction on a District Court in a suit to enjoin the collec-

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D., pp. 40–57) is a sufficient answer to the allegations of petitioner's fn. 2.

On August 6, 1959, the defendants in the criminal case (*United States of America* v. *The Shotwell Manufacturing Company,* No. 1, Oct. Term, 1957) filed motions with this Court to (1) vacate orders of this Court dated December 16, 1957, granting certiorari, vacating judgment of the Court of Appeals, and remanding the case to the District Court, and (2) to enter new orders denying the government's petition for certiorari and directing the District Court to vacate the sentences imposed upon the Shotwell Manufacturing Company, Byron A. Cain, and Harold E. Sullivan, on May 22, 1959.

tion of taxes, and while the Court of Appeals found it unnecessary to consider this aspect of the case (Pet. App. A, p. 5), the total absence of any special or extraordinary circumstances provides independent support for the result which the court reached when it dismissed the suit for lack of jurisdiction.

3. There is no conflict. The asserted conflict (Pet. 17–18, 25–26) with the decision of this Court in *Helvering* v. *Taylor*, 293 U.S. 507, is clearly nonexistent. There the Court was dealing with the standards to be applied in determining the amount of tax liability in Tax Court proceedings, not the standards to be applied in determining whether jurisdiction exists to enjoin collection of the tax. The remaining decisions relied on by the taxpayer (Pet. 19–22) are all clearly distinguishable on their facts and present no conflict of law.[4]

4. There is no merit in the taxpayer's suggestion (Pet. 6, 8–9, 26–30) that enforcement of the jeopardy assessment pursuant to the decision of the Court of

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[4] Thus, where it was clear as a matter of law, or was alleged in the complaint, that the plaintiffs could not possibly be held accountable for certain assessed taxes or penalties, and where it was also clear that collection would utterly destroy or seriously harm a going business, collection was enjoined in *Shelton* v. *Gill*, 202 F. 2d 503 (C.A. 4); *National Foundry Co. of N.Y.* v. *Director*, 229 F. 2d 149 (C.A. 2); and *Midwest Haulers, Inc.* v. *Brady*, 128 F. 2d 496 (C.A. 6). Injunctive relief was granted in *Smith* v. *Flinn*, 261 F. 2d 781 (C.A. 8), and *Yoke* v. *Mazzella*, 202 F. 2d 508 (C.A. 4), because the taxing authorities had failed to comply with express statutory provisions enacted for the protection of the taxpayer, and in *Yoshimura* v. *Alsup*, 167 F. 2d 104 (C.A. 9), the court enjoined collection where revenue agents had used coercive threats and fraud to obtain the taxpayer's consent to assessment.

Appeals would constitute a denial of due process. This Court and other courts have uniformly held that, because adequate legal provision is made for ultimate judicial determination of tax liability, collection of a jeopardy assessment does not violate the due process clause of the Fifth Amendment. *Phillips* v. *Commissioner*, 283 U.S. 589, 595–597, and fn. 6; *Dyer* v. *Gallagher*, 203 F. 2d 477, 478–479 (C.A. 6); *Harvey* v. *Early*, 66 F. Supp. 761, 763–764 (W.D. Va.), affirmed, 160 F. 2d 836, 838 (C.A. 4); *Communist Party, U.S.A.* v. *Moyse*y, 141 F. Supp. 332, 339 (S.D.N.Y.). As noted above, the taxpayer will be able to litigate the issue of its tax liability in the proceedings now pending in the Tax Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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